IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-78,099-01

EX PARTE GUADALUPE LOPEZ, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 10-10-06789-MCRAJA IN THE 365TH DISTRICT COURT FROM MAVERICK COUNTY

***Per curiam*.**

O R D E R

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of possession of marihuana and sentenced to ten years' imprisonment. He did not appeal his conviction.

This case was remanded for responses and findings addressing Applicant's contention that his plea was involuntary because he was not released to community supervision after spending 180 days in prison due to his ineligibility for "shock" probation. The trial court held a hearing and made findings that Applicant's initial guilty plea was voluntary, as it did not contemplate "shock" probation. TEX. CODE CRIM. PROC. art. 42.12 § 6. The initial plea agreement contemplated an eight-

year "cap" on punishment, and the State stipulated that it would not object to argument for a lesser sentence, including probation. The record after remand shows that Applicant was represented by different lawyers at his initial guilty plea and his sentencing hearing. Sentencing counsel invited the trial judge to exceed the negotiated cap and sentence Applicant to ten years' imprisonment and a $10,000 fine if the trial judge would retain jurisdiction for 180 days and consider Applicant for release to "shock" probation. The record contains no response from Applicant's sentencing counsel and no findings as to whether counsel determined whether Applicant was eligible for "shock" probation before inviting the trial court to sentence Applicant above the negotiated cap and then consider him for "shock" probation. Based on the current record, Applicant could be entitled to relief.

As we held in *Ex parte Rodriguez*, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960), the trial court is the appropriate forum for findings of fact. The trial court shall order sentencing counsel to respond to the claim that his ineffective acts harmed Applicant. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d). In the appropriate case, the trial court may rely on its personal recollection. *Id*.

It appears that Applicant is represented by counsel. If the trial court determines he is not represented by counsel and elects to hold another hearing, it shall then determine whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall appoint an attorney to represent Applicant at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall make findings of fact and conclusions of law in regard to counsel's actions at sentencing. The trial court shall make specific findings addressing whether counsel knew that Applicant was not eligible for "shock" probation. The trial court shall make specific findings

detailing how Applicant was advised by sentencing counsel as to his eligibility for "shock" probation at the time of his plea. The trial court shall also make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claim for habeas corpus relief.

This application will be held in abeyance until the trial court has resolved the fact issues. The issues shall be resolved within 90 days of this order. A supplemental transcript containing all affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or deposition, along with the trial court's supplemental findings of fact and conclusions of law, shall be forwarded to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: May 15, 2013
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